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IN THE
SUPERIOR COURT

OF THE

City and County of San Francisco,

DEPARTMENT NO. 5.

*In the Matter of ISAAC S. KALLOCH,
Mayor of the City and County of San
Francisco.*

ARGUMENT OF W. H. L. BARNES

REPORTED BY CLEMENT BENNETT,

Short-Hand Writer.

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No. 1173.

IN THE SUPERIOR COURT

OF THE

City and County of San Francisco,

DEPARTMENT NO. 5.

IN THE MATTER OF
JACOB S. KALLOCH, Mayor of
the City and County of San
Francisco.

*Special Proceedings under the Provisions of an Act
of the Legislature of the State of California,
entitled "An Act providing for the Removal of
Civil Officers for a Violation of Official Duties,"
Approved March 30th, 1874.*

ARGUMENT OF W. H. L. BARNES

In support of the petition of Joseph A. Coolidge,
and in opposition to the General Demurrer inter-
posed thereto by Respondent, through his coun-
sellors, Henry E. Highton, W. T. Baggett, and
Harold Thornton.

Filed at _____ C. CARY, *Judge.*

Hon. ROBERT FERRAL,	} Superior Judges Assisting.
Hon. J. F. SULLIVAN,	
CHARLES HALSEY,	
Hon. L. D. LATIMER.	

General Barnes.—May it please your Honors: We come now to what in our judgment is, and we frankly admit it, the strain of this case. The argument addressed to the Court this forenoon, is in the nature of a general demurrer to the whole case presented by this petition. It admits, for the purpose of the argument only, that the Respondent has committed all the acts charged. The demurrer is not addressed to a defect in any portion or subdivision, but it is addressed to the whole case, and stands in position for the purposes of this argument as if we had passed through all the stages of the trial; had demonstrated to your Honors reasonable satisfaction that all and singular the acts which are made the basis of this petition were thoroughly, substantially, and completely established. Upon this state of facts the question arises, Do these acts come within the purview of the act of 1874, and has the respondent been guilty of such willful violation of duty as, under the provisions of Section 1 of the Act, requires that he shall be removed from his office?

I propose to meet the question fairly and fully, if I can, without any evasion of the consequences which may follow from the determination; because it is not our desire to proceed with the further investigation of this case, any more than we should proceed to its final conclusion, if we were satisfied, or had been up to this moment satisfied by the argument adduced on the other side, that this application ought not to be sustained; and I trust I do not flatter myself too much in asserting, that if I could see here and

now that the argument is one that ought to weigh in the consideration of the Court, to the extent of dismissing this proceeding, I should at once concede it.

I do not make the concession. I ask for the statute no liberal construction. I do not petition the Court to "legislate," as was intimated this morning, nor to give to the statute any other or different meaning than the closest legal judgment can give it. The statute, in my judgment, and I so press it on your Honors, is sufficiently broad and ample to include within its terms every single one of the charges presented in this petition; and without undertaking to criticise in detail their argument, I think my learned friends have narrowed the scope of the act by their construction, and to an extent to which I think this Court will not give its adherence.

I will not occupy time in debating the proposition presented by Mr. Baggett, that the object of the concluding portions of Section 1 of this act was merely to give to a public officer, or the Board of Election Commissioners, or any other Board which possesses the power of appointment to subordinate offices, the power of removal; or that the appointing power shall be compelled under this statute to come into Court to remove a defaulting, disobedient, or neglectful clerk. I think the argument is not worthy of attention. The act has a wider scope. I will read Section 1:

"Any member of any Board of Directors, Board of Commissioners, or other Board of officers, state, city, county, or district, or other person who has been elected, or appointed, or who shall

hereafter be elected or appointed to hold, control, build, or manage any public building of this state, or of any county, city, or city and county, in this state, or to hold, control, manage, or disburse any of the public funds of this state, or of any county, city, or city and county in this state, or any person acting by, through, or under the authority of any such Board of Directors, Board of Commissioners, or other Board of officers, or other person, as aforesaid, or any other officer in the state who shall be guilty of a willful violation of any of the provisions of the statute under which he or they were or may be hereafter elected or appointed, or of any other statute or statutes of this state prescribing or defining their duties and powers, or passed for their government and control, or who shall be guilty of any other willful violation of official duty, shall be deprived of his office, and otherwise punished, in accordance with the provisions of section two of this act." Laws of 1873-4, p. 911.

Observe how broad the language is. It covers the case of *any* officer *in* this State who shall willfully violate, not only the provisions of the statute under which he may have been elected or appointed, or of any other statute or statutes of this State, prescribing or defining his duties and powers, *but also any law passed for his government and control*, or who shall be guilty of any other willful violation of official duty.

The argument this morning was confined to certain sections of statutes of this State, some in existence, and some long since repealed, prescribing certain official acts to be performed by various public officers and declaring various

duties to the discharge of which the Mayor of this city and county was assigned.

These were not all of the statutes of this State passed for the government and control of officers in this State, nor are they all the enactments adopted by the Legislature or prescribed by constitutional enactment,—the highest form of legislation,—for the government and control of the Mayor of this city.

This petition alleges that the respondent was at the proper time duly elected Mayor of the “third commercial city of the union;” that he entered upon his office and took the oath prescribed by Section 904 of the Political Code, to the language of which I call the attention of the Court:

“SEC. 904. Before any officer enters on the duties of his office, he must take and subscribe the following oath: I do swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of———, according to the best of my ability.” That he gave the bond required by law, and at the time prescribed entered on the discharge of the duties of his exalted station. What laws were then in force for the government and control of officers within this State? I call your Honors’ attention to the Act of the Legislature passed April 3, 1876. I note the sections, so your Honors can get them together, and I will subsequently apply them in what I shall endeavor to say:

“Section 3. It shall be unlawful for any such railroad company to grant free passes for travel within this state, except to the following persons:

First. Directors, officers, agents, and employees of the company and their families.

Second. Officers and agents, and railroad contractors of other railroads or telegraph companies.

Third. Destitute persons.

Fourth. The members of the Board of Transportation Commissioners of the State of California, their secretary, attorney, and employees, while traveling in the discharge of their official duties.

Fifth. Public messengers, troops and other persons, who are under existing laws, or any contract of such railroad company with this state, to be transported free of charge.

“Every such railroad company shall keep a record of all free passes issued by it, except such as are issued by it to officers, agents and employees and their families, and of the several classes thereof, and of the number of times each pass shall be used, and shall report the same to the Transportation Commissioners whenever required.”

“Section 6. Any such railroad Company that issues free passes to any person, or persons, other than those specified in Section 3 of this chapter, or shall permit any person whatever, to travel free upon their cars, except upon the exhibition of free passes issued as provided in said section, shall forfeit and pay for each offence, the sum of one hundred dollars, to be recovered and paid over, one half to the State Treasurer, and the other half to the informer, as in the last section provided.”

Section 5510, Hittell's Code, Vol. 1. “Street railroads are governed by the provisions of Title 3 of this part, so far as they are applicable, unless such railroads are therein specially excepted.”

Also, Section 651 of the Penal Code, subdivision 2, “Every officer of the State, or any county, city, or township therein, who keeps or retains

any part or portion of the salaries or fees allowed by law, to his deputy clerk, or subordinate officer, is guilty of a felony."

Also the Constitution of this State, Article XII, Section 19, "No railroad or other transportation company shall grant free passes, or passes or tickets, at a discount, to any person holding any office of honor, trust, or profit, in this State; and the acceptance of any such pass or ticket, by a member of the Legislature, or any public officer, other than Railroad Commissioner, shall work a forfeiture of his office."

Also to the following sections of the Penal Code, relating to the public peace:

Chapter 4. Section 719, Penal Code. "Police in cities and towns and their attendance at exposed places. Organization and Regulation of the Police.

"The organization and regulation of the police in the cities and towns of this State, is governed by special laws."

Section 720. "*The Mayor* or other officer having the direction of the police of a city or town must order a force sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended."

Section 726. "Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the Sheriff of the county and his deputies, *the officials governing the town or city*, or the justices of the peace and constables thereof, or any of them, *must go among the persons assembled, or as near to them as possible, and command them in the name of the people of the State, immediately to disperse.*"

Section 728. "When there is an unlawful or riotous assembly *with the intent to commit a felony or to offer violence to person or property, or to resist by force the laws of the State or of the United States, and the fact is made known* to the Governor, or to any Justice of the Supreme Court, or to the District Judge of that judicial district, or to the County Judge or Sheriff of the county, *or to the Mayor of a city, or to the President of the Board of Supervisors of the cities and counties of Sacramento and San Francisco*, either of those officers may issue an order directed to the commanding officer of a division or brigade of the organized National Guard or enrolled militia of the State, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified, to aid the civil authorities in suppressing violence and enforcing the laws."

Section 731. "Whenever any portion of the National Guard or enrolled militia shall have been called into active service to suppress an insurrection or rebellion, to disperse a mob, or to enforce the execution of the laws of this state, or of the United States, it shall be competent for the Commander in Chief, or for the General acting in his stead, *to place such troops under the temporary direction of the Mayor of any city, or of the President of the Board of Supervisors of the Cities and Counties of Sacramento and San Francisco, or the person acting in that capacity*, of the Sheriff of any county, or of any Marshal of the United States; and if, in the opinion of such civil officer, it shall become necessary that the troops so called out shall fire or charge upon any mob or body of persons assembled to break or resist the laws, such civil officer shall give a written order to that effect to the superior officer present in command of such troops, who will at once proceed to carry out the order, and shall direct the firing and attack, to

cease only when such mob or unlawful assembly shall have been dispersed, or when ordered to do so by the proper civil authority. No officer who has been called out to sustain the civil authorities shall under any pretence, or in compliance with any order, fire blank cartridges upon any mob or unlawful assemblage, under penalty of being cashiered by sentence of a court marshal, provided that nothing in this section shall be construed as prohibiting any such troops from firing or charging upon such mob or assembly, without the orders of such civil officers, in case they shall first be attacked or fired upon, or forcibly resisted in discharge of their duty."

These statutes were passed for the government of all public officers in this State. They related to the duties of the Mayor of San Francisco; to his obligation and oath of office, under the Constitution and laws of the United States, to preserve, maintain and enforce public peace and tranquillity, under all circumstances and however situated. He is a MAGISTRATE charged with compelling the observance of the law relating to the public peace, and is, in the highest sense, the supreme peace officer of the city and county. It is his duty to observe the Constitution and the laws of the State, and these various charges are presented as violations of these laws.

What is the first? You must take the charge as it is presented in the complaint. Respondent's counsel this morning said it would not do for us to shelter ourselves behind its verbiage or undertake to evade the terms of the statute by artfully adding to each recital of fact or act that it was done in his official capacity. But it seems to me that so far as the pleading

is concerned, the fact must be assumed as we have alleged it, viz.: that the Mayor of this city, for the purpose and with the intent of exciting riot, of making public disturbance, advised persons subject more directly to his influence than men of better education and more learning would have been, to the commission, at a time and place thereafter to be appointed by him, of outbreaks, of injuries to property and injuries to persons. Assume that it was his official duty as the conservator of the public peace at all times to maintain and preserve it by his official action—what sort of discharge of that official duty is the conduct laid at the door of the respondent by these proceedings? And I submit that I am unable to appreciate, in such a case, the distinction drawn by my learned friend, Mr. Baggett, when he said that there was a wide distinction between the acts of the respondent as Mayor of the city and his acts as an individual.

Assuming that the serious charges against him are true, and the fact is that the Mayor of the city and county of San Francisco, sworn to support the Constitution and the laws of this State; who is made by its statutes the pre-eminent peace officer of this community, to whom, on occasions of outbreak and disturbance the people have a right to look, and must look for the enforcement of the law; to whom, when property is about to be attacked and human life threatened, the citizen must turn as his bulwark and refuge; in whose hands is placed the solemn duty of calling on the armed force of the State to fire on his fellow citizens; who is directed by law to disperse unlawful

assemblies; whose duty it is, by warning and example, to teach lessons of peace and subordination to law; whose official business it is to pour oil on troubled waters, and on commercial and social dissension, has gone out in his civic robes to men full of discontent, all the more serious if the complaints in which they indulge, are well founded; if a wrongful system of government maintained by corruption, is driving them and their children to starvation, and worse social disaster; discontent all the more portentous of evil if the charges made against the system of servile labor existing in the State of California, is in fact, driving men to poverty, their boys to States Prison, and their girls to the street; all the more ominous if these men to whom he presents himself have been long without work, and stand upon the streets waiting for labor which they cannot find; whose habitations, vacant of the comforts and decencies of life, are crowded with skeletons of despair, while a sleek and well-fed pagan race passes, happy and contented, from industries in which they can take no part or share; men who see boys growing up about them who will never learn an honest trade until they shall have violated the law and gone to the States Prison; and as the Mayor of the city, used the language contained in this bill, for the purpose of inciting them to riot and to the destruction of property; advising the withholding of acts of violence, until he shall be able to go to the head of the column, and, like Navarre with his white plume, be in the thickest of the carnage,—the leader of the crusade against the

lives and the property of the people whom he has sworn to defend,—shall any man be heard to say that such acts and language were done and uttered by the respondent in his personal capacity, and for which, as Mayor of the City and County of San Francisco, he should not be held responsible? The complaint alleges:

“That, for more than one year last past, there has existed in the City and County of San Francisco a class of persons who have agitated political subjects in an unlawful and turbulent manner. That since, and during the time the said Isaac S. Kalloch has been Mayor of the City and County of San Francisco, as aforesaid, and acting as such, large bodies of men have been assembled and got together, and have been addressed by persons using blasphemous and incendiary language, and language calculated to provoke a disturbance of the public peace. That these persons have been publicly exhorted and advised by the said Isaac S. Kalloch, then and there being Mayor of the City and County of San Francisco, to form processions and parade the streets of the city. That, in accordance with the advice and assured by the moral support of said Isaac S. Kalloch, Mayor of the City and County of San Francisco, processions and parades of persons turbulent in conduct and violent in language, have been had, whereby trade has been stagnated, industries checked, public peace disturbed, the well-being of society and the stability of government endangered, property has been depreciated in value and improvements, public and private, checked and prevented, thereby causing great financial loss and misfortune, and preventing large numbers of the respectable working classes and mechanics in the City and County of San Francisco from obtaining a livelihood and support for themselves and their families.”

I ask, if the conclusion of this case should show a state of facts such as is alleged, this Court could say that the Mayor of the City and County of San Francisco had not violated his official duty and the laws passed for his government and control? That in counselling, aiding and abetting the assembling and marching of turbulent mobs through the streets of the City and County of San Francisco, threatening property, menacing life, and committing acts calculated to provoke a breach of the peace, he had not violated his oath of office, his duty to the constitution of the State of California, his duty to the statutes that were passed for his government and control, as the Mayor of the City and County of San Francisco, and that the statute I have read could not cover such a case? With such power in his hands as the chief executive officer of this city, can he go among the turbulent, the lawless, the vicious, or among men who, whether lawless and vicious or not, were smarting under a sense of wrongs that they felt were driving them from the right to live, and incite them to the commission of acts of violence, which destroyed the value of property, and still hold his office and leave the people to the action of the Grand Jury and the slow process of the courts, when such a statute as that of 1874 is in the books?

The complaint also alleges :

“That on divers occasions and in divers places, the said Isaac S. Kalloch, then and there being Mayor of the City and County of San Francisco, has endeavored to encourage and incite certain

persons in the City and County of San Francisco, to keep and maintain themselves in such a manner as to be able to commit an outbreak against the law whenever he should so advise."

Now for the purpose of this argument, your Honors must take it for granted, that at divers times and places, the Mayor of this city, as Mayor of the city, and with the force and the power and the influence that his high official rank gave him, advised these people to keep and maintain themselves in such a manner as to be able to commit an outbreak against the laws whenever he should so advise. The complaint alleges:

"That the said Isaac S. Kalloch, while Mayor of the City and County of San Francisco, as aforesaid, has purposely and knowingly, and falsely accused various branches of the City Government of dereliction of duty and of corruption in office, for the purpose of weakening their influence, and destroying their efficiency, so that he might strengthen his own power for the accomplishment of his own unlawful ends, and the securing of his private purposes. That he has exerted himself continuously to engender a wicked and brutal feeling among the poor against the rich, and has incited the former to lawlessness, to mob violence against individuals, and to insurrection against the laws and government of the State of California and of the United States.

"That, under the pretence of counselling certain persons in the City and County of San Francisco against mob violence, and while pretending to urge respect for and obedience to the law, he has purposely and treacherously advised them to be and maintain themselves in readiness for bloodshed and violence, and overthrow of the lawful authorities; and especially that on or about the

15th day of February, 1880, the said Isaac S. Kalloch, then being Mayor of the City and County of San Francisco, and acting as such, did utter and deliver a speech to certain persons assembled at or near the New City Hall, of the City and County of San Francisco, in the following language:

“ ‘ The fact is I am really powerless to help you much. For some reason or other the Mayor has been shorn of all power, and in reality, has but slight influence in the government of the city. The workingmen elected a few candidates to conspicuous positions, but those occupying those positions have little patronage or influence. If we had elected our whole ticket, I have no hesitation in saying that before this, all worthy unemployed men would have been furnished with work. But what shall the unemployed men do now? The poor-houses are full. The hospitals are overcrowded. There is no room in the penitentiary. Where can they go? The Supervisors can find them employment if they will; they can set them to work sweeping our dirty streets, and filling up the filthy sloughs, including Lake Merced, if they will. This principle of finding work for the unemployed masses was acted upon by the two Napoleons, to their advantage and the happiness of the people, but what has been recognized and acted upon by the despots, our millionaires fail to understand. I am in favor of setting men to work and soliciting contributions from the wealthy to pay them, until the Legislature can make an appropriation therefor. I only throw out these suggestions for the benefit of our wealthy men, who would do well to heed them, if they do not want to fare worse.’ ”

Bear in mind what this bill says about this class of men to whom he was addressing himself as the Mayor of the city.

“ ‘In the meanwhile, get up mass meetings and processions, and make your wants known, so that those in power can have no excuse for not understanding the true condition of things. The Street Department is able to furnish work for all who need it without a single cent of additional expense to the city. I think the time has now come for action. I have counselled you for five years to be obedient to the law and abide your time. You have done so. The question now is, not whether you will conform to the Constitution, but whether the great corporations will keep the law. If they can afford to transgress the law, what right have they to complain if you do so.’ ”

Never, since the sun rose on civilization, was such language used by the Chief Magistrate of a great commercial city, to a suffering, turbulent, organized body of men ready to be let loose, and in their wrath, to attack the men and the properties pointed out by this address!

“ ‘If they can afford to transgress the law, what right have they to complain if you do so. I believe the Chinese are a nuisance, and that the bill introduced by Senator Johnson, compelling the corporations to discharge the Chinese, will become a law. I am going to Sacramento to-morrow to work for its passage. Now don't you go to work and burn down a solitary Chinese wash house, or kick a poor lone Chinaman, but restrain yourselves and act like sensible men until such time as I again report to you. If these corporations continue to disobey the law, I will tell you what to do. I am doing all I can in your behalf, and wherein I have failed, it is because of the crippling of my body and energies by the bullet of the assassin. In the meantime, do not wait for employment, but go to the Supervisors and demand work

of them. Commit no overt act or do no illegal thing until you hear from me again.' "

When the "Chief Magistrate of the third commercial city in the United States" shall stand before the bar of Justice, whose high behest it is to enforce the law, to see that justice is done to all men alike, before whose presence the rich and the poor stand alike, and is proved thus to have delivered himself, and without respect for courts and officers of the law and the machinery of the Government which he was sworn to protect and defend, what shall be said in his behalf?

Can he use this language to men not accustomed, like himself, to handle words and distinguish between the hoarse cry of the demagogue and the counsel of the executive head of this metropolis, whose direct natures see no difference between a word and a deed, who are ready to act when they have their leader, and that leader the Mayor of the City and County of San Francisco,—can he tell them, and go unwhipped of justice, to "commit no overt act until you hear from me again," because he spoke it as a citizen and not as Mayor? Let it never be judicially declared that this was not conduct in willful violation of official duty if exhibited, as this complaint alleges it was, to such a class of persons, by the "Chief Executive Officer of the third commercial city in the United States." If it is a willful violation of that official duty which imposes on him the obligation of putting an end to turbulent assemblies, of going to the spot where they are assembled, or, in the prudent language of the Statute, "as near to them as possible," and of commanding them to cease

from turbulence under penalty of the law, it will be for your Honors, perhaps, ultimately to determine whether this shocking language was, in its intent and meaning, an official invitation to violence and disregard of law. Let us imagine that the Mayor of the city was called upon to address his fellow citizens who were suffering great hardship: would you not suppose that when, as the Mayor of the city, he went to talk to them about their wrongs, as well he might do, that he would call their attention to the fact that there were Courts where wrongs would be redressed; laws to which they could appeal; and that the golden garments of the rich fall into dust and rags, when arrayed against the panoply of law? Would you not say it was his duty, his official duty, to teach them lessons of subordination to, and awaken in them that wholesome respect and reverence for, principles without which free institutions can never be maintained?

This complaint goes on to allege:

“That on the day herein aforesaid, and at the place aforesaid, the said Isaac S. Kalloch, then and there being Mayor of the City and County of San Francisco, for the purpose and with the intent of inciting his hearers to mob violence, and to forcible and unlawful accomplishment of their wishes and purposes, in respect to the Chinese resident in the City and County of San Francisco and in the State of California, did utter and use the following language, which your complainant believes and alleges to be expressive of a determination to resort to mob violence against individuals, and resistance to the laws of the State of California and of the United

States,"—and it goes on and quotes: "And I shall not cease to call for justice, until I get it. And not until a time comes, which I do not anticipate, when the courts of my country refuse me their protection, will it be for me to remind them that there is room on the sand lots for a gallows as high as Haman's."

Let us recollect, in this connection, that the gallows which Haman erected for another was decorated by his own dangling corpse.

"The Chinese must go. Peaceably if we can." This is the language of the Mayor, not of an unlettered man; not of a man of the people, who, with a sense of their wrongs, was struggling in his rude way to express what he thought and felt, but of the Mayor of the city, the man selected by the majority of our citizens, as the exponent of the law; not to make law, but to see it executed.

"The Chinese must go. Peaceably if we can, forcibly if we must. A revolutionary measure is a last resort. Every other method must first be tried, every other means must first be exhausted. But when this has been done, and done in vain, and the people are all united, and are all aroused in a holy cause, 'Like lions out of slumber, in innumerable number,' where is the wrong or wrongdoer that can stand before them? Such a people in such a spirit and in such a cause, I should be proud to lead. (Applause.) You will find out some time, whether anybody else is fooling or not; but I mean business when I say the Chinese must go."

Are not such language and such incitations and exhortations a violation of the official duty which he owes to the peace system of this city and county, with its multitude of inhabitants, its

vast property, its prominent position, commercially and socially? Is it conduct which, as long as he is under the sanction of his oath of office, he has the right, under the cloak of citizenship, to exhibit?

- . "And this complainant further alleges, that at the time of the election and qualification of said Isaac S. Kalloch, Mayor, as aforesaid, of the City and County of San Francisco, and at the time of the filing of his bond aforesaid, and at the time of his entering upon the duties of his office as Mayor, as aforesaid, and while he was acting as such Mayor, there were, and ever since have been and now are certain statutes of the State of California under which, the said Isaac S. Kalloch was elected to his said office of Mayor of said City and County of San Francisco, and other statutes of this State prescribing and defining his duties and powers and passed for his government and control. That said Isaac S. Kalloch, so being Mayor, as aforesaid, of said city and county, and while acting as such Mayor, has been guilty of willful violations of the provisions of the statutes of this State which were in existence at the time of his election, qualification and induction into office, and ever since, and were passed for the government and control of the said Isaac S. Kalloch in executing the duties and powers of his office. That said Isaac S. Kalloch has willfully and knowingly violated the provisions of the said statutes and each of them, in this, that he has knowingly, and willfully and corruptly, while being and acting as Mayor, as aforesaid, asked and received emoluments, gratuities, rewards, and the promise thereof for the obtaining and furnishing employment in certain of the public offices in the City and County of San Francisco."

If this be true, here is a plain and direct violation of his official duty. It would be sufficient to cause his removal, for it is in the teeth of the statutes of this State, to which I have called your Honors' attention.

Mr. Highton: You do not wish to be understood by the Court as saying that the Board of Election Commissioners, as such, have the power of appointing any of the officers in the Registrar's office? As I understand the law, the appointments have to be made by the Registrar himself, and are not made by the Board, if I am not mistaken.

General Barnes: It is not material whether you are or not. If you want me to state the evidence I will do so, but I do not think it advisable now.

The Court: How broad is the allegation? Is it to a pointed gratuity?

Mr. Highton: I should like to have the allegation read.

General Barnes: Reads, "The obtaining and furnishing employment in certain of the public offices in the City and County of San Francisco of divers persons, and retaining and causing to be retained said persons in office, to-wit: in the office of the Sheriff of the City and County of San Francisco, J. W. Clough, John Doe Cavanaugh, John Doe Higgins, John Doe Powers, John Doe Hatch, whose real names are unknown to this complainant, and other persons whose names are to complainant unknown. In the office of the Registrar of Elections of the City and County of San Francisco, John Doe Tintus, John Doe Jacoby, John Doe Falk, John Doe Hughey, and John Doe

Backus, whose real names are unknown to complainant; and that said persons and each of them have, as complainant is informed and believes, heretofore, and upon the request of said Isaac S. Kalloch, paid and delivered to him emoluments, gratuities and reward for obtaining offices for them and causing them to be retained in the offices by them respectively filled and each of them, and said Kalloch has received and appropriated to his own use some proportion of the moneys received by said persons as and for their salaries or compensation to them allowed by law, or by resolution of the Board or department of the said government authorized to create such offices and affix salaries thereto, and has thereby made to himself, by virtue of his office of Mayor, unlawful, improper and extortionate gains and profits."

Judge Ferral: Will you be kind enough to read the provision of the statute as regards the appointments?

Mr. Highton: Can you say that the appointing power is in the Election Commissioners?

Judge Ferral: I wish to see what the language is, whether it is, who shall appoint, or who shall procure appointments.

General Barnes: First I read Section 13,074 of Hittell's Compilation, which is Section 74 of the Penal Code, Title 5, relating to crimes by and against the executive power of the State :

"Every public officer who, for any gratuity or reward, appoints another person to a public office or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding five thousand dollars, and, in addition thereto, forfeits his office and is forever disqualified from holding any office in this State."

I would like to interrupt the course of my argument for a moment to remark that counsel, in discussing this question, called attention to the Penal Code, which provided for the punishment of what was in that Act termed misdemeanor in office. But the Act of 1874 expressly declares that whoever can be dealt with by that Act may be dealt with by this, and that it may be availed of in addition to the cumbersome process provided by the provisions of the Penal Code; and that it was intended so to be, is evident from the fact that the Act of 1874 was passed after all these other provisions, to which counsel called attention, had been enacted by the Legislature. In the same connection, I call your Honors' attention to the Section found in a subdivision of Hittell's Compilation, numbered 13,651.

“Section 1. Every person who employs laborers upon the public works, and takes, keeps, or receives any part or portion of the wages due to such laborers to the State or Municipal Corporation for which such work is done, is guilty of a felony.”

Why then, if it be true, as alleged in this complaint, that the Mayor of the City and County of San Francisco received corrupt gratuities or rewards for appointing any person to a public office, was he not guilty of a violation of his duty? Did he not willfully violate one of the provisions of a statute in force when he was elected?

It is suggested that the act of 1874 related merely to a failure to discharge some statutory

duty, an offense committed, as the counsel suggests, by omitting to sign some draft or warrant, or refusing to approve a bond. He may not only be indicted and punished criminally for some omissions of duty, but, as a cumulative remedy, and in case of violation of statutes passed for his government and control, an appeal may be had to the civil courts to turn him out of office, as speedily as may be necessary, without reference to the question of criminal responsibility; and that is what was meant by the Statute of 1874; otherwise, why was it passed? The law does no vain thing. Your Honors have doubtless observed how, frequently, in the statutes relating to official duty, the power to remove a public officer for a failure to discharge it, or for any willful or corrupt act in office, is granted. He may be removed under half a dozen sections by which penalties are imposed for a failure to perform specified official acts. If he neglects to perform such an act as the approval of a bond, he shall pay a fine; and the Court may remove him from office. He may also be presented by the Grand Jury, or on indictment found, be tried, convicted and sentenced to penal servitude, and also deprived of his office. If he is convicted of felony he becomes civilly dead, and is thereafter disqualified to take or hold any office in the gift of the people. And yet, after officers in this State had stood for years under the shadow of such an official gallows as these Penal and other statutes erected by them, the Legislature created still

another—this Act of 1874—and made it as broad and complete as the English language permits. If he violated the law under which he was elected; if he violated any law which was passed while he was in office; if he violated any law passed for his government and control, he may be removed from office. Now, what does this language mean? Does it simply refer to a possible failure to discharge some of the multifarious detail duties, for which authority was found in the series of Acts recited here—which, by the way, did not include the Act relating to the Board of Election Commissioners, of which respondent was *ex officio* a member? It surely did not mean to cover merely the failure or omission to discharge some official duty, such as approval of a bond, such as attending and presiding over meetings of the Board of Supervisors, meetings of the Water Commissioners, or of the City Hall Commissioners, or any other similar duty; but it means that when the law says he shall not accept a gratuity for putting a man in office, and he corruptly does so; if it says that he shall not make a guilty gain or unlawful profit to himself out of his office and its patronage, and he fails to keep and observe these commandments, he has violated willfully a law passed for his government and control. And as if that was not enough the statute goes on to say, “or is guilty of any other willful violation of duty.” I suppose there are a great many acts not directly controlled by statute which, if committed, might render him amenable to the law of

1874. But it is enough for the present argument to say that this general demurrer to the whole complaint may not be sustained, because it appears that he did willfully disobey statutes of the State passed for his government and control, and was guilty of a willful violation of official duty, to wit: in corruptly appointing men to office for hire and reward, and in using his office of Mayor to make a profit to himself by selling offices under his control. It does not make any difference whether they were in the Sheriff's office or the Registrar's office, or about the department of the porter in the City Hall. The gist is, that the "Chief Executive officer of the third commercial city of the United States" shall be pure in his great office, and that he shall not make barter and sale of its patronage. He may reward his friends. He should, and I hope he has. Offices are gifts which the successful competitor has to shower on those who have been his faithful henchmen and marched under his banner. I believe in the principle that to the victor belongs the spoils. But there are certain species of spoils which the victor may not appropriate. He may appoint his friend to an office, but he may not sell it to him. He may appoint him to an office which he himself has assisted in creating for the purpose, perhaps. He may affix a salary to that office, and vote on the proposition to raise a salary; but when all is done, it becomes the sole and separate property of the happy individual who is inducted into it, and so remains, and the

Mayor who has placed him there has no right to keep, retain, withhold, accept, or receive one single dollar of that public money which the law has awarded to the person who renders the service. If your Honors examine these statutes, I think you will see that the whole scope and object of them was to govern and control the natural cupidity of men in power, so that they shall not make a trade of public offices, that they shall receive the gains, salary, reward and emoluments belonging to them by law, and nothing else. And when the respondent went beyond that limit he violated, counsel says, only the mere trifling expectations of some code of morals, some mere personal ethics, some mere matter of individual propriety. But I respectfully suggest that when a public officer commits such acts as these in the State of California, though he may accomplish them a hundred times and go unwhipped of justice, he may finally run squarely into the jaws of the penitentiary. If he is caught at some of them, at least, he shall be deemed guilty of a felony. When the law says a public officer shall do a thing, and he fails to do it, of course, say my friends, he is guilty of a willful violation of duty. If, for instance, the law requires that on a certain day he shall perform a certain official act, and he fails to do it on that day, he is guilty of a willful violation of official duty, and may be removed from his office; but if the law says he shall *not* do a thing under penalty of removal, and he does it, it is no willful violation of official duty! It is a

mere impropriety, a mere moral obliquity, a mere divergence from that straight line of rectitude which the law of morals expects him to pursue. I say it is true; for instance, that when the law declares a public officer shall not accept a free pass, and he does it, he is just as much guilty of a willful violation of official duty as if it had commanded him to do some act and he had not done it. In other words, the rule of conduct extends in both directions. It covers the sins of omission and the sins of commission as well.

I submit, assuming for the purpose of this argument, that the Mayor of the City has been shown to have made a trade in offices under his control, has sold them for money, has inducted men into office for money, and has kept back and shared the compensation of those in office, as part of the plunder of his official station, then he has violated the statutes passed for his government and control. The suggestion of his counsel that all these acts constitute no official offense, or if they do, that he should be proceeded against by indictment, that his official crimes should be dealt with in some of the various modes suggested by the learned gentleman, as by proceedings by the Attorney General; by invoking penal statutes passed for the punishment, as criminals, of those public officers who bring themselves within the purview of criminal statutes, is all beside the question. These penal statutes existed long before the passage of the Act of 1874, and the reason of its passage as a cumulative remedy must be apparent.

Justice was seen to halt, stumble, and fall prostrate at the doors of Grand Jury rooms. Attorneys-General were not always swift to pursue offenders of their own political faith. Something more was needed, and the statute of 1874 supplied the omission.

We have heard much of the natural right of the citizen officer to be proceeded against "according to the ancient forms of law," and the Grand Jury has been lauded in set phrase as the great bulwark of American liberty. I once indulged in that sentiment myself, but in the Constitutional Convention of this State I learned that the Grand Jury was an effete and useless institution; that it was no longer the bulwark of freemen, and defender of individual rights; and so it came to be that, under the New Constitution, all offences must be proceeded against on information filed by the District Attorney; provided that once in each year, the District Attorney may assemble the bulwark of American liberty; but for all remaining time, American liberty must stagger along as best it may, without the Grand Jury.

Now, any offense, from that of the starving tramp, who in the grey light of early morning takes an illegal drink out of an exposed milk-can, or, to feed a hungry child, appropriates a loaf of bread, the property of another, may be proceeded against by information, on equal terms with the "Chief executive officer of the third commercial city in the United States," who has incited reckless men to mob violence, who has sold offices,

and who has traded in everything that can be made the subject of guilty barter ; and who has violated both Constitution and statute by begging for and using free passes on every railroad he could reach. The law makes no distinction between them. No natural right is overthrown by this statute. There are no natural rights in question ; and it is a fallacy, it seems to me, to indulge in such a line of observation as has been made here upon the arbitrary character of the statute. It simply (and that was the very purpose and object of it) removes from the turmoil and influences of social and political life, the cases of public officers. It is not difficult to imagine instances where, if there were no verdict possible but the judgment of a jury, grand or petit, a public officer innocent of any offense, might, by an indictment of a Grand Jury arrayed against him for other than justifiable causes, be dragged to trial in a time of great popular excitement, and unjustly deprived of his office. It would be more apt to work injuriously to the good citizen in this way than any other. The American people, and more particularly this people, are subject to great political excitements. Popular sentiment is ever swinging, like a great pendulum, from one side to the other. It has no equilibrium, but is always moving—sometimes to the right, and oftener to the wrong. It is lamentable to observe how public opinion will exalt or degrade men, without the slightest regard to those high considerations of virtue and vice, sin and

holiness—*fas et nefas*—those great tests which should control human estimates of the acts of men, and of human character. The only power able to arrest this ever swinging weight, and still its uncertain oscillations, is the judicial hand which holds the plumb of the eternal and unchanging spirit of Law. There rests that judgment which, just in proportion as it maintains its equipoise of even justice, lifts itself—and with reverence I say it—to the majesty and dignity of the eternal throne of God !

Why, if your Honors please, what need a man, however assailed by the unprincipled enmities born of political life—however beset on every side by the dogs of partisan hate, yet conscious of right and virtuous official life—desire more than an intelligent, a calm, a dignified and just tribunal, that neither is, nor can be made a minister of wrath, nor wheedled nor forced to give expression to the plaudits of undeserved popularity. No personal rights or official prerogative can be injured, or diminished, when the attacked comes to stand before such a tribunal, at a time, and in a case like this, exciting public attention, and drawing such a concourse of friends and enemies as this case has brought together. He need not fear to look with confidence into the face of his judge, however much he might tremble before twelve men filled with the passions and emotions of partisan hate or devotion, which drag them, like the evil spirits of which we read, whithersoever they will. It has been to the bench that men have

ever turned in times of intense political excitement, for justice and the enforcement of law. To say that trial by jury is the best or proper method to dispose of cases of this character, is an utter fallacy in law, as well as in fact.

The Legislature had the power, under the Constitution, to determine the mode and manner in which they should be disposed of. It has vested jurisdiction to hear and determine them in the Court alone. It says to all men: "Stand back! Let the assailed come without fear into the Temple of Justice. Let political hate, personal animosities, the bitter and unseemly strife of partisans, the ulterior and dishonorable purposes of politicians, die at our threshold!" Well may the innocent thank God that human wisdom has devised such a refuge; but well may the shrinking and trembling criminal, well may the official whose breast is burdened with deadly secrets, which, like some muttering convulsion of nature beyond his control, are threatening to upheave and destroy him, cringe as the tremulous limbs bear their polluted burden into the presence of justice!

Let us hear no more of presentments by Grand Juries, or of an appeal to jury trial under the provisions of the Penal Code. The law of 1874 was passed for the purposes I have indicated. It is the shield of the innocent, as it is the sword of the destroyer to the guilty.

Let us come to these ticket transactions. There are some things of which Courts take judicial knowledge. Among them are the condition of

the country and its political history. It has been assumed that one of the great difficulties under which the administration of Republican Government labors in these latter days is the controlling influence of property represented by corporations. The philosophic idea that underlies our form of Government is an equal distribution of wealth and the impossibility of perpetuities. Estates cannot be entailed. The laws of their succession and division have here, as in every free country, engaged the attention of the best and wisest minds; hence constant efforts to prevent the accumulation and transmission of large landed estates, and to check the supposed unhealthy interference of great corporations or associations which aggregate capital, with legislation. It is often asserted, and to a considerable extent believed, that our existence as a Republic is actually threatened by reason of the ability to combine wealth in overshadowing corporations. This is the bottom idea of most legislation on the subject of corporations. I do not assert that corporations do the evil charged to them, but the majority of mankind have come to believe it. And one of the chief mischiefs which legislators have in late years sought to prevent has been the handling by great railway and transportation companies of men in office. It is truly a despicable view to take of one supposed to be fit to occupy high official station, that he can be bribed to do that which is wrong, or hired to do that which is right, by the pitiful gratuity of a free ride. But

your Honors know, as part of the political history of the country, that this subject has been legislated on in many ways; and time and again the law has struck at this system of controlling public officers by means of free passes. I have called your Honors' attention to the statutes on this subject more to exhibit the gradual growth of law, as expressive of public sentiment, than for any other purpose; because, so far as the present proceeding is concerned, we stand not on the declaration of the Legislature in respect to the official duty of every man in office not to accept and not to receive a free pass. Its acceptance by a public officer was a statutory misdemeanor before the new Constitution was adopted. Yet this offense, which is treated so lightly by the counsel, was thought worthy of recognition in the new Constitution of the State of California. The large and respected body of the elect who assembled in that Convention considered it of too great importance to be left to the Legislature of the future. They were apprehensive that the legislator of the future might himself fail to find a statutory verdict against the use of free passes, and perhaps release railroad corporations, himself and other public officers, from any such inhibition. Shall it be said it is a trifling matter when the Constitution of this State, Article XII, Section 19, in dealing with this most important subject of corporations, finds it necessary to establish the law of free passes as an immutable principle?

It is curious and interesting to observe how this pillar of the Constitution, now reaching to the political sky, has grown and strengthened as years have gone on, until from being now and then a taunt flung out in political debate, or a plank in a political platform, it came to be legislated on again and again, and more and more strongly inhibited until at last it has taken the form of permanent, irrepealable constitutional law. It has augmented like a formation in the lime-stone caverns of the west, where one may set up a willow wand from floor to roof, so slight that it will not bear the burden of a child's hand, yet day by day there comes from above and from below, stalactite and stalagmite, enveloping it with a garment growing more and more substantial year after year, until at last there stands a pillar white and pure which sustains the very arch of the roof above, and will continue to stand though the woody fibre at its core has decayed and vanished forever. So has this pillar of the Constitution grown, and there it must stand forever!

If your Honors please, is it a trifling thing, this subject, so dealt with by the Constitution? Who shall be heard to say it is an unimportant enactment? How severe the penalty which it prescribes for an act in itself so immaterial as the acceptance of a free pass from a railroad corporation! So far as civil life is concerned it is severer than the old law of England which inflicted the death penalty for petty larceny. If an officer of this State accepts a pass he shall forfeit his office. The provision is as follows:

Section 19. "No railroad, or other transportation company, shall grant free passes, or passes or tickets at a discount, to any person holding any office of honor, trust, or profit, in this State, and the acceptance of any such pass, or ticket, by a member of the Legislature, or any public officer other than a Railroad Commissioner, shall work a forfeiture of his office."

It is the mere acceptance which is punished, and not the use. The public officer need not travel a single furlong on the steel belt that binds the country together. He may even accept it, and then repent, and return the pass to its donors: but the word of fate has gone forth for him, and for him there is no place of repentance from the hour in which he accepts it. In other words, the Constitution-makers intended to close the door before it was opened. They took out the door. They walled it up. From the Governor to the lowest citizen of the State of California, who occupies a public station to which he is elected or appointed,—for the discharge of the duties of which there is a pecuniary return, and for which there is a limitation of time, and a successor,—if such an one accepts a pass, he forfeits his office. The penalty is the same as if he had committed a felony, for the statute declares that if any public officer in this state shall be convicted of any crime amounting to felony, he shall thereby forfeit his office. There is hardly any crime in our catalogue of more than decalogic offences, provided against by the Penal Code, of which he can be guilty, and not receive a punishment less severe. He forfeits his office.

The Constitution does not say in so many words that he is guilty of a willful violation of official duty if he accepts the pass, but I appeal to your Honors, if that constitutional provision is not a plain and positive inhibition against the acceptance, or use of free passes by all public officers, the disregard of which prohibitory command is a willful violation of official duty? The Attorney-General, it is true, might proceed. Perhaps they might be indicted. They may also be pursued under the act of 1874.

The complaint sufficiently alleges that the Respondent solicited and received three hundred tickets without paying any consideration therefor, from the Mission Street, or City Railroad Company, and an annual pass from the Market Street Railway Company, and that he even went into the very jaws of the ogre of California civilization, to wit: the office of the Southern Pacific Railroad Company, and there solicited, in defiance of the Constitution of the State of California, a free pass from here to Los Angeles and back, with stop-over privileges. If he did go to the Superintendent of the Mission Street Railway Corporation, and ask him if there was not some way in which he, the Mayor of the City and County of San Francisco, could ride perpetually free on its cars,—representing that he lived on the line of the road—was a man of high station—was surrounded by large numbers of his friends and fellow-citizens, who would cease to patronize the road if their leader was no longer located in its vicinity, and that he required assistance to the extent of \$30 per month in tickets, to enable him to

travel free on that street railroad, and finally compromised for, and accepted, three hundred free tickets a month, it is enough to say that such conduct was a direct violation of the law of the State, and of the Constitution adopted for his government and control. The Constitution made the law, and established the penalty for him; and so far as this particular offence is concerned, and the penalty provided for it, the Constitution is self-operating. Consider, if you please, the next charge, that he did apply to, and solicit and receive from The Southern Pacific Railroad Corporation, engaged in the business of transporting passengers and freight between San Francisco and Los Angeles, a free pass, under the circumstances stated, was not that equally a violation of his official duty?

It has been suggested that all these acts were done by Respondent as an individual, and that they have nothing to do with his office of Mayor.

I suppose it was intended by the suggestion that unless this free pass from the Market Street Railway Company, and the pass from the Southern Pacific Railroad Company, and the 300 free tickets from the City Railroad Company, were obtained by respondent, as Mayor, by virtue of an Ordinance of the Board of Supervisors, or an Act of the Legislature, requiring him to demand and receive the passes as Mayor of the City and County of San Francisco, for use in visiting Hospitals, or the Alms House, or the Industrial School, or the House of Correction, or on some public business, the solicitation and the taking were not unlawful, and constituted no offense against the Constitution and Laws of the State.

What utter nonsense! If it be a public offence in a public officer to accept such passes, what sort of an excuse is it to say, "True I did those acts forbidden by law and the Constitution, under penalty of being deprived of my office, but I did them in my individual capacity. I laid aside my civic robe when I went to the office of the Market and Mission Street Railroad Companies, and kicked off my official sandals when I stepped into the presence of the officers of the Southern Pacific Railroad, and prostrated myself at their feet, and solicited a free pass from San Francisco to Los Angeles and back. All was done by me individually and not as Mayor." With equal force might he say, had he been indicted, tried, and convicted of burglary, and I had come into Court with the record of his conviction, and had asked an order declaring that his office was forfeited according to the terms of the statute of this State,—that he had committed the burglary in his individual capacity, and not as Mayor; and with equal propriety might the Court assent to that view, and permit him still to act as Mayor of the City of San Francisco; to sign its ordinances from behind the bars of San Quentin, and be brought in charge of a guard to preside over meetings of the Board of Supervisors and numerous Commissions as required by law, to hang up his hat and his hand-cuffs together, and on stated occasions to ornament the gorgeous Mayor's office in the New City Hall! Can this be an answer to the solemn declaration of the Constitution? Counsel say, the Attorney-General is alone authorized to file information for the purpose of determining the title to the office by

the use of some one of the various writs available at common law for that purpose, and so ascertain whether respondent has forfeited it, or is holding it pursuant to law. Well, I suppose it would be possible for the Attorney-General to promote proper process for the determination of the question, but we are not driven to that resort. The statute of the State steps in and places the matter with this Court on the petition and application of any citizen. When the statute was passed, the procedure provided by it took the place of the common law writs. It is no longer necessary to resort to any extraordinary legal remedies. The statutes furnish one, both plain and adequate, declaring what the complaint should be and contain; how it should be served, and how the matter should be proceeded with to final judgment; and the forfeiture, if any, is to be declared by this Court, and in this proceeding.

If your Honors please, if the facts here alleged are true, I repeat that the respondent has willfully violated the statutes of this State passed for his government and control, and has violated the Constitution of the State of California, which, with uplifted hand in the presence of his fellow-citizens he swore to maintain and defend. Nor are the facts trifling, nor to be brushed aside as the personal peccadilloes of an able man. They have been by law taken out of the category of personal acts. The Constitution has proclaimed that no longer shall a public officer place himself under obligations to these great corporations, but that he shall stand free and clear of their influence and control. Former statutes provided that a

private citizen should not accept such a pass, and that the Railroad Company should be punished if it issued one to the private citizen; but for the public officer who shall descend from his station, and go with outstretched hand seeking this particular kind of alms there is provided the penalty of removal from office. The Constitution did not intend, and the law does not intend that such acts shall be treated as trifling and personal transactions. There is no such element in them. They are pure, unadulterated, crystalized violation of constitutional law and official duty that cannot be glossed over, forgotten, or forgiven.

So, I conclude, as I began, by saying that this is a general demurrer to the whole case, and not to any particular part of it. If any one of the allegations here set forth constitute a violation of laws passed for the government and control of "officers in this State," of whom your Honors have already held the Mayor of the City and County of San Francisco to be one, then this general and sweeping demurrer may not, and I hope I do not go too far in saying, will not be sustained.

Col. Harry I. Thornton, of counsel for respondent, briefly replied and the Court took the case under advisement. On the following day the Hon. James C. Cary, Department Judge, pronounced the following

DECISION.

Judge Cary. This is a proceeding to remove Isaac S. Kalloch, Mayor of the City of San Francisco, from office, under the provisions of an Act of the Legislature of the State of California, entitled "An Act providing for the removal of civil officers for violation of official duties," approved March 30, 1874. The complaint sets forth at large the various acts committed by the respondent, charged as being in violation of his official duties, and in that behalf alleges: First, that he did on divers occasions deliver certain intemperate, inflammatory and scandalous harangues. Second, that he corruptly asked and secured gratuities and rewards for obtaining and furnishing employment to sundry persons in the public offices of the city. Third, that he solicited and accepted free railroad passes.

There is a general demurrer to the complaint, upon the ground that on the face of it it appears that the delinquencies complained of were not committed by respondent in the course of his official duties as Mayor, and are therefore not within the operation of the statute.

The statute referred to provides that any officer of the State may be removed from office in the following cases:

First—If guilty of willful violation of any of the provisions of the statute under which he was elected or appointed.

Second—For a willful violation of any statute prescribing or defining his duties and powers, or passed for his government and control.

Third—If guilty of any other violation of official duty.

We are all of the opinion, that in order to remove an officer for a violation of any of the foregoing provisions of the statute, it must appear, both by allegation and proof, that the act performed by him was an official act, committed either in the corrupt or negligent performance of a duty growing or springing out of the fact that he is an officer in the performance of the duties of his office, or in a willful or corrupt neglect to perform his official duties.

It was never intended that this statute could be utilized to deprive an officer of his office because he is a ward politician or a corrupt and dangerous man, or one given to making indiscreet or inflammatory speeches. Laws of a different character, providing for a widely different mode of procedure, are in force to meet such cases by the punishment and removal of the offender from office. It was clear to us that the acts charged in the complaint as a ground for the removal of the respondent from his office were not performed by him under color of or by virtue of his position as Mayor of the City and County of San Francisco. It is not our purpose, however, at this time to state at large our reasons for this conclusion. To

do so opens up a field of debate altogether too extensive. The questions arising in this case up to this point have been elaborately presented and have been discussed with distinguished ability on both sides, rendering it quite unnecessary for the Court to do more than announce its decision, and that is:

First—That the scope and purpose of the Act of 1873-4 was to provide a summary remedy for the removal of public officers guilty of non-feasance or mis-feasance in office in the course of their official duties, and not otherwise.

Second—That the acts charged against the respondent were not committed by him in the course of or in the line of his official duties as Mayor, but as a private citizen, and we therefore hold that he is not within the meaning or operation of the statute, or of the mischief against which it so carefully provides.

It results that the demurrer must be sustained and the proceedings dismissed, and it is so ordered.

CARY, Judge.

DISSENTING OPINION OF JUDGE LATIMER.

Judge Latimer. I agree with my associates upon all points except that which will now be noticed.

The Constitution provides (Article XII, Section 19): “No railroad or other transportation com-

pany shall grant free passes, or passes or tickets at a discount to any person holding any office of honor, trust, or profit in this State; and the acceptance of any such pass or ticket, by a member of the Legislature or any public officer other than Railroad Commissioners, shall work a forfeiture of his office."

This section of the Constitution is inhibitory, and the inhibition extends both to the granting by the company and the acceptance by the public officer, named in the section of free passes, &c., and the penalty for the acceptance of such passes, &c., by the officer, is forfeiture of his office.

This section is self-operative, and needs no legislative action to carry it into effect, except as to the manner of declaring the office of the offending officer forfeited.

That the office of the Mayor of the City and County of San Francisco is a public office, and the incumbent thereof a public officer within the meaning of the section of the Constitution named, must be admitted.

The complaint in this case alleges among other things that the defendant did, while holding the office of Mayor of the City and County of San Francisco, and while acting as such officer, accept and use free passes and tickets from three different railroad companies, viz: the Market Street Railroad Company, the City Railroad Company, and the Southern Pacific Railroad Company.

For the purposes of the general demurrer which has been interposed by the defendant to the complaint, these allegations must be taken as true, and the facts stated in them being true, they work a forfeiture of the office of Mayor by the defendant, as is expressly provided by the section of the Constitution stated.

The only question therefore to determine in this connection is, can the forfeiture be declared, or in other words, can the defendant "be deprived of his office" in this proceeding?

This proceeding is had under the provisions of the Act of the Legislature of this State, approved March 30th, 1874. (Statutes 1873-4, p. 911.)

It is entitled "An Act providing for the removal of civil officers for a violation of official duties."

It is provided in the first section, among other things, that "Any officer in the State who shall be guilty of a willful violation of any of the provisions of * * any statute or statutes of this State, * * passed for their government or control, * * * shall be deprived of his office * * * in accordance with the provisions of section two of this act."

The proceedings in this case are in accordance with the provisions of section two of that Act—at least no objection has been made that they are not so in accordance.

It must be conceded that the acceptance of the

passes, &c., was in violation of Section 19, Article XII, of the Constitution, and if that section can be considered as a statute of this State, passed for the government and control of all officers in the State, then the general demurrer should be overruled.

That the Constitution is a statute of the State within the meaning of the Act of the Legislature of March 30th, 1874, I have no doubt, and that the section named was passed for the government and control of all public officers in the State, including the Mayor of the City and County of San Francisco, seems equally certain.

It is contended however, on behalf of the defendant, that the words "government" and "control," as used in the Act of the Legislature under which these proceedings are had, mean government and control in the matter of performance of, or omission to perform, official duties, and that official duties are such as are prescribed by law to be performed by the incumbent of that office.

In a general sense, official duties are such duties as pertain to the office held, and they are generally prescribed by laws, which also regulate the mode and manner of the performance of the official acts pertaining to the office.

But the words "for their government and control," as used in the Act referred to, have a broader signification, and this is evident from the Act itself.

It is provided that an officer shall be deprived of his office if he shall be guilty of willfully violating—

1st. “Any of the provisions of the statute under which he or they were or may be hereafter elected or appointed.”

2nd. “Any other statute or statutes of this State prescribing or defining their duties and control.”

3rd. “Any other statute or statutes of this State * * * passed for their government and control.”

To limit the Act to the construction claimed for it by the defendant, would be to hold that nothing whatever is added to it by the third paragraph stated.

This is apparent and need not be elaborated, for it is evident that the 1st and 2nd paragraphs would cover all cases that could arise under the construction of the Act claimed by the defendant.

But under the ordinary rule for the construction of statutes, effect must, if it reasonably can, be given to each and every part.

Giving some effect then to the 3rd paragraph, what is the meaning of the words *government and control*, or *statutes passed for their government and control*?

Suppose the statute says: “The Mayor shall not appoint any one as his clerk or secretary who cannot read and write.” Would not this be a

statute for his control in that matter, and if he did make such appointment, would he not violate a statute passed for his government and control within the meaning of the Act of 1874?

Or if it provide that the Mayor shall not profit by any contract, or should not engage in certain employment, would it not be the same.

And in my opinion, this view in no manner conflicts with the decision in *ex parte Herald* (47 Cal.) as that was a different proceeding, had under a different statute, and before the Act of 1874 was passed.

The case then stands thus : The Mayor of the City and County of San Francisco is a public officer. Public officers are inhibited by the Constitution from receiving free passes, &c., under penalty of forfeiture of office.

So far as this case is concerned therefore, the Constitution may be read, and the acceptance of any such pass or ticket by the Mayor of the City and County of San Francisco * * shall work a forfeiture of his office.

It being conceded that the Mayor, the defendant here, did accept such free pass, &c., it follows from what has been said that he has violated a statute of this State passed for his government and control, and that the general demurrer ought to be overruled.

Whether and how far the defendant in this case might be prosecuted for *misdemeanor* in office under

Sec. 18, Art. IV, of the Constitution, and the statute enacted in pursuance thereof, I have not had time to consider, nor is that question involved in this case. That the consideration of it would open a wide field, is evident from notable cases that readily occur to the mind.

The simple question here is : Is he amenable under the Act of the Legislature under which this proceeding is brought?

And I am of opinion that the Act referred to in no manner deprives the State of any remedy otherwise provided, but that the intention was simply to provide another, further and additional remedy for the enforcement of official duty. In fact it is expressly declared in the Act itself, that it shall not be construed to repeal or impair the provisions of any other Act concerning officers, but shall be construed to be a cumulative remedy only.

LATIMER, Judge.

